Filed 2/2/10 DeSantis v. Bilello & Costa Trading CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PASQUALE DESANTIS et al., Plaintiffs and Appellants, v. BILELLO & COSTA TRADING, INC. et al., Defendants and Respondents.	F055817 (Super. Ct. No. 8387) **OPINION**

APPEAL from a judgment of the Superior Court of Mariposa County. F. Dana Walton, Judge.

Gilmore, Wood, Vinnard & Magness, David M. Gilmore, Jody L. Winter, Scott L. Jones and Jennifer J. Panicker for Plaintiffs and Appellants.

Dietrich, Glasrud, Mallek & Aune, Donald H. Glasrud and Peter G. Fashing for Defendants and Respondents.

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An investor who acquired rights as an assignee under a gold delivery agreement sued the assignor, claiming the assignor breached its obligations under both the gold delivery agreement and the assignment documents.

We conclude (1) the assignor did not breach any obligation owed the investor-assignee under the gold delivery agreement; (2) the obligations under the assignment documents were not enforceable because the assignor received no consideration and, alternatively, the obligations were extinguished by a subsequent amendment that provided the investor-assignee with a different guarantor; and (3) the trial court's findings that the assignor did not commit fraud are supported by sufficient evidence and by the proper interpretation of the underlying documents.

We also conclude that the award of attorney fees to the assignor must be reversed. First, the documents do not state the investor-assignee is liable for the assignor's attorney fees. Second, the investor-assignee would not have been able to recover attorney fees from the assignor under the gold delivery agreement's attorney fees provision and, therefore, the investor-assignee is not liable for attorney fees under the mutuality of remedy requirement in Civil Code section 1717 (section 1717).

The judgment in favor of the assignor will be affirmed, but the award of attorney fees will be reversed.

FACTS

This litigation involves certain mining claims located near El Portal, California in Mariposa County. The mining claims numbered 521, covered approximately 10,000 acres, and were owned in 1997 by AT&E Enterprises, Inc. The parties have referred to the mines as the Mariposa Mines, the El Portal Mines, and the AT&E mining claims. This opinion will refer to the mining claims as the Mariposa Mines, the term used in a federal criminal case involving one of the defendants. (See *U.S. v. Geiger* (6th Cir. 2008) 303 Fed.Appx. 327, 328 [Daniel Geiger's 2004 convictions for defrauding a pension fund of $6.7 million in an investment scam involving the Mariposa Mines were affirmed].)

In 1997, defendant Daniel S. Geiger wanted to acquire the Mariposa Mines. AT&E Enterprises, Inc., and its owner, Mike Garoogian, could not deliver clear title to the Mariposa Mines because they had collateralized a loan with a deed of trust against the mines. In addition, the loan had gone into default and the secured lender had begun

judicial foreclosure proceedings in Mariposa Superior Court. Consequently, Geiger began negotiations with the secured lender, Pasquale and Carmela DeSantis (DeSantis), to acquire their interest in the Mariposa Mines.[1]

As a result of these negotiations, a corporation controlled by Geiger entered into an agreement with DeSantis. The corporation was defendant USA Mining, Inc., a Nevada corporation which at that time was named Minerais Barexor USA, Inc. (USA Mining). The negotiations and agreement between USA Mining and DeSantis resulted in many documents, including one entitled "Memorandum of Understanding" (MOU) dated January 15, 1998.

Under the MOU, DeSantis transferred to USA Mining all of his rights, title, and interest in the Mariposa Mines, the notes and deeds of trust relating to the Mariposa Mines, and the judicial foreclosure lawsuit. In return, DeSantis received USA Mining's promises (1) to pay him one percent of any gold extracted from Mariposa Mines pursuant to an agreement of net smelter return and (2) to deliver an assignment of an agreement under which DeSantis would receive 4,000 troy ounces of 0.9995 fineness gold bullion.

The agreement under which DeSantis was to receive 4,000 troy ounces of gold, which was to be assigned to DeSantis pursuant to the MOU, was entitled "Contract No. MBX2009" (contract MBX2009) and had been entered by USA Mining and defendant Bilello & Costa Trading, Inc. (B&C) on September 29, 1997.[2] The MOU describes B&C as "a State of New York Commodities Broker, with offices located at the New York Mercantile Exchange, COMEX Box 793" at an address in New York City.

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[1]Mrs. DeSantis is a party to this litigation and signed the relevant documents, but otherwise had a passive role in the transactions. Consequently, for ease of reference, masculine singular pronouns will be used when referring to DeSantis in the rest of this opinion.

[2]Defendant Lawrence J. Bilello was a principal of B&C and acted on its behalf in the transactions relevant to this lawsuit.

B&C and Bilello are the only respondents in this appeal. Defendants Geiger and USA Mining entered a settlement agreement and mutual release with DeSantis and his law firm in April 2004.

Bilello testified that B&C conducted business on the commodity exchange trading floor by providing execution services to customers in futures transactions.

Contract MBX2009 provided that USA Mining would deliver 22,950 troy ounces of 0.9995 fineness gold in exchange for $7 million. Bilello testified that in mid-1997 he was introduced to Geiger, who was looking for investors to develop a mining property in California. Geiger told Bilello that he needed to raise about $7 million to get an existing mine in operation and redo the mill. Bilello told Geiger that B&C did not have the wherewithal to make that size of investment or to buy large amounts of gold.

Geiger and Bilello's initial attempts to find investors were not successful. Bilello testified that Geiger came up with the idea of creating a contract that would give B&C the right, but not the obligation, to purchase $7 million of gold for future delivery at a discounted price. When Geiger or Bilello located an investor, the plan was to have B&C assign a portion of contract MBX2009 to that investor. Bilello testified that, based on this idea of obtaining an up-front investment in exchange for the future delivery of gold at a discounted price, Geiger drafted contract MBX2009 and they signed it. Both Geiger and Bilello testified that the purpose behind contract MBX2009 was to raise money and that B&C was not obligated to purchase the gold.

The MOU required USA Mining to cause B&C to execute and deliver to DeSantis a contract and assignment for the delivery of the 4,000 ounces of gold. The MOU also provided that the "contract and assignment … shall constitute an absolute obligation of B&C to manage contract MBX2009 and deliver said gold bullion to DeSantis."

To fulfill this obligation, Geiger drafted documents for B&C to sign and deliver to DeSantis. The documents consisted of (1) an "Assignment of Contract MBX2009," (2) a letter of "Acceptance and Price Fix" dated as of January 15, 1998, and (3) an exhibit to the letter entitled "Exhibit 'A,' Transaction Summary Contract MBX2009" (collectively, the Assignment Documents).

The letter of Acceptance and Price Fix contained language that tracked the provision of the MOU quoted earlier. It stated that "this agreement shall constitute an

absolute obligation of B&C … to manage contract MBX2009 and deliver said gold bullion to DeSantis." In addition, the letter stated that B&C agreed "to assign with recourse" the delivery of the gold. The "assign with recourse" phrase also was used in the transaction summary document.

The Acceptance and Price Fix, like the MOU, provided for the delivery of 1,000 ounces of gold on December 31, 1998, the delivery of another 1,000 ounces six months later, and the delivery of the final 2,000 ounces on December 31, 1999.

B&C and Bilello received nothing in exchange for undertaking the obligations stated in the Assignment Documents. Bilello testified that he involved B&C in the transaction because of the transaction's potential to develop future business for B&C by introducing it to new clients.

In December 1998, USA Mining was unable to meet its scheduled delivery obligation. The parties then signed a document entitled "Amendment of Contract MBX2009 and Notice of Election of Delivery." The amendment extended the date for the delivery of the first 1,000 ounces of gold to January 15, 1999. The amendment also stated:

> "1. For and in consideration of this extension, Sovereignty, LLC and R. Douglas Dahl agree to guarantee performance under said Contract for Delivery of Gold, together with this amendment and shall stand in stead of any other Guarantor or hedge, except USA Mining, Inc."

The amendment was signed by Geiger on behalf of USA Mining, by Bilello on behalf of B&C, by R. Douglas Dahl on his own behalf and on behalf of Sovereignty, LLC, and by DeSantis.

Despite this extension, USA Mining was unable to deliver any gold to B&C or directly to DeSantis. In October 1999, USA Mining, Bilello, and DeSantis executed another amendment. USA Mining was required to deliver 700 ounces of gold to DeSantis's bullion account upon execution of the amendment, and the next delivery was scheduled for January 15, 2000. USA Mining was unable to fulfill the delivery required

by the amendment. Instead, it delivered 686 ounces of gold to DeSantis. USA Mining never delivered any gold or cash equivalents to B&C or Bilello.

PROCEEDINGS

On November 1, 2002, DeSantis filed a complaint against Geiger, USA Mining, B&C, and Bilello. Subsequently, DeSantis added Sovereignty, LLC and Dahl as named defendants.[3]

In March 2004, a judgment after default was entered against Bilello and B&C. The judgment directed them to either deliver 3,314 ounces of gold to DeSantis or pay him damages in the amount of approximately $1,366,000. The judgment also awarded DeSantis attorney fees in the amount of $50,531.25.

In August 2004, Bilello and B&C moved to set aside the default and default judgment. The trial court granted this motion, and the matter proceeded to trial.

In 2007, the parties stipulated to bifurcate the trial. As a result, in November 2007, a two-day bench trial was held on the issue of liability. The parties submitted posttrial briefing and proposed statements of decision.

In March 2008, the trial court issued its statement of decision. The trial court determined that B&C and Bilello were not liable to DeSantis for breach of contract or fraud and stated that judgment would be entered in their favor.

B&C and Bilello then filed a memorandum of costs and a motion for attorney fees. In October 2008, the trial court issued a decision stating B&C and Bilello were entitled to an award of costs and an award of attorney fees. The court determined the attorney fees requested were reasonable and awarded the sum of $575,324.

The operative judgment in this matter—a second amended judgment—was filed in December 2008. The next month, DeSantis filed an amended notice of appeal.

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[3]Default judgments were entered against Sovereignty, LLC, and Dahl and those parties are not part of this appeal.

DISCUSSION

I. Standard of Review

Generally, appellate courts independently review questions of law and apply the substantial evidence standard to a superior court's findings on questions of fact. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [questions of law are subject to independent review]; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [substantial evidence rule].)

Generally, the written statement of decision issued by the trial court after a bench trial is adequate if it explains "the factual and legal basis for its decision as to each of the principal controverted issues at trial …." (Code Civ. Proc., § 632.) This statutory requirement often is reformulated by appellate courts as follows: "'The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case.' [Citations.]" (*In re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 736-737, fn. 15.) Under this principle regarding the adequacy of a statement of decision, the term "ultimate fact" generally refers to a core fact, such as an essential element of a claim, which is distinguished from evidentiary facts and from legal conclusions. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.)

Evidence is "substantial" for purposes of the substantial evidence standard of review if it is "of 'ponderable legal significance,' 'reasonable in nature, credible, and of solid value' …. [Citations.]" (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 507.)

II. Rights and Obligations Created by Contract MBX2009

A. Trial Court's Findings

In paragraph 1 of its statement of decision, the trial court found that DeSantis's rights under contract MBX2009 arose from the assignment transaction. The court interpreted contract MBX2009 to mean: "B&C and Bilello had a right, amounting to an option, to purchase gold from USA Mining pursuant to the terms of MBX2009, but not

an obligation." Based on this interpretation, the court found "that B&C and Bilello are not and have never been in breach of the contract MBX2009."

B. Contentions of the Parties

DeSantis contends that the trial court erred by determining that (1) contract MBX2009 was an option, (2) B&C had no obligation under the contract to purchase gold, and (3) B&C had not breached contract MBX2009.

Specifically, DeSantis argues that nothing "amounts" to an option because an agreement either is an option or it is not. DeSantis contends the agreement is not an option because it lacks elements essential to an option, such as consideration for the right to buy the 22,950 ounces of gold or a specification of the length of time the option was to remain open. DeSantis contends the express language of contract MBX2009 demonstrates it is not an option, and parol evidence should not be used to contradict the written terms. Furthermore, DeSantis also contends that B&C breached its obligations under contract MBX2009, regardless of whether or not it was an option.

C. B&C Did Not Breach Contract MBX2009

Initially, we note that B&C's obligations under contract MBX2009 pose a question that is separate and distinct from B&C's obligations under the Assignment Documents. The distinction is significant to this case because it is possible that B&C did not breach any obligation created by contract MBX2009 itself, but still breached an obligation contained in the Assignment Documents.

We will not discuss whether contract MBX2009 should be labeled an option or something else. Choosing a label is beside the point. The fundamental question is whether B&C failed to perform an obligation imposed by that written agreement.

Our analysis of the question of B&C's obligations under contract MBX2009 begins by separating that contract into two portions. The first portion was assigned to DeSantis and concerns 4,000 ounces of gold. The second portion is that part of the contract that was not assigned. We employ this mode of analysis even though it was not explicitly adopted by the parties because paragraph No. 6 of contract MBX2009 provides

the contract "is assignable and divisible." Under this provision, DeSantis's claim of breach of contract necessarily relates only to that portion of contract MBX2009 that was divided from the remainder of the contract and assigned to him.[4] In other words, an assignee's contractual rights do not extend beyond that which was assigned to the assignee.

In this case, the parties do not dispute that USA Mining received payment for the 4,000 ounces of gold that it was to deliver to DeSantis. The payment took the form of the transfer from DeSantis of his rights in the Mariposa Mines, which included DeSantis's lawsuit for judicial foreclosure.[5] Therefore, any argument that B&C breached contract MBX2009 by failing to pay USA Mining for the 4,000 ounces of gold is the equivalent of interpreting contract MBX2009 to mean that B&C was obligated to pay USA Mining for the 4,000 ounces of gold a second time. Such an interpretation is unreasonable because the provisions *of contract MBX2009* do not condition USA Mining's obligation to deliver the 4,000 ounces of gold on being paid twice for it. Consequently, the trial court correctly interpreted contract MBX2009 to mean that B&C was not obligated to pay USA Mining for the 4,000 ounces of gold.

DeSantis seems to argue that B&C breached contract MBX2009 by failing to deliver any gold to him. We reject this theory of breach because contract MBX2009 does not require B&C to deliver any gold to anyone. We recognize that the Assignment Document may impose a delivery obligation on B&C, but the failure to fulfill any such obligation is not a breach of contract MBX2009. Accordingly, we conclude that B&C did not breach contract MBX2009 in the manner claimed by DeSantis.

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[4]We note that DeSantis has presented no arguments that his claims relate to the unassigned portion of the contract.

[5]The absence of a dispute on this point is illustrated by, among other things, paragraph No. 12 of DeSantis's proposed statement of decision, which asserts that B&C undertook its obligations to DeSantis under the assignment "knowing that DeSantis had already paid what DeSantis was obligated to pay." Similarly, at page 15 of his opening appellate brief, DeSantis asserts: "He had already paid and that is recited in the assignment."

DeSantis challenges the foregoing interpretation by arguing that contract MBX2009 clearly labels B&C as the "Buyer" and USA Mining as the "Seller" and that these labels conclusively show the parties intended B&C, as the buyer, to be obligated to purchase the gold covered by the contract. This argument is not convincing because the labels "Buyer" and "Seller" do not unambiguously show that the party identified as the buyer had an *unconditional* obligation to buy the goods identified in the contract. In other words, it is reasonably possible that these labels could have been used in a contract where the obligation to purchase was conditional or entirely within the discretion of the potential buyer.

Our determination that B&C did not breach an obligation it owed to DeSantis under contract MBX2009 only resolves one of DeSantis's breach of contract theories. DeSantis's second theory, which we address next, concerns whether B&C breached an obligation or duty it owed to DeSantis under the Assignment Documents.

III. Meaning of an Assignment With Recourse

The primary dispute regarding B&C's obligations to DeSantis concerns the meaning of the Assignment Documents and the rights and obligations created by those documents.

DeSantis argues that the Assignment Documents plainly state that B&C's assignment to him was "with recourse," and the inclusion of that term means the assignor (B&C) accepted liability to the assignee (DeSantis) in the event USA Mining dishonored its contractual obligations.

A. Provisions of the Assignment Documents

The Acceptance and Price Fix was signed by Bilello on behalf of B&C and by DeSantis as assignee and included the following:

> "[T]his agreement shall constitute an *absolute obligation of B&C Trading Co. to* manage contract MBX2009 and *deliver said gold bullion* to DeSantis. [¶] Pursuant to the terms of the above referenced Contract, we agree to *assign with recourse*, the delivery of 4,000 troy ounces of .9995 fineness gold (hallmarked), to be delivered [in three installments]." (Italics added, underscoring omitted.)

The "assign with recourse" phrase also was used in the document labeled Exhibit "A" Transaction Summary Contract MBX2009, which was signed by Bilello as managing director of B&C. Specifically, it provides: "B&C Trading Co. agrees to *assign with recourse*, an undivided interest in said contract for the delivery of a certain quantity of .9995 fineness gold bullion …." (Italics added.) In addition, paragraph No. 7 in that document begins: "B&C … accepts responsibility as the commodity broker and primary contract holder to insure performance under the assignment of said contract, including but not limited to accepting and forwarding delivery of the gold as you direct."

B. Trial Court's Findings

The trial court interpreted the Assignment Documents as follows: "The obligation of B&C and Bilello to [DeSantis] was to deliver any gold received from USA Mining to [DeSantis]." In effect, the court interpreted the "absolute obligation" to deliver "said gold bullion" to mean the gold bullion that USA Mining delivered to B&C. Because USA Mining did not deliver any gold to B&C or Bilello, the trial court concluded that B&C and Bilello had no obligation to deliver any gold to DeSantis.

C. Discussion

DeSantis contends the trial court's interpretation of the Assignment Documents was error because the assignment was "with recourse" against B&C.

The terms "with recourse" and "without recourse" are used most often in the context of negotiable instruments, the topic covered by division 3 of the California Commercial Code.[6] For example, when a negotiable instrument is dishonored, an indorser of the instrument is not liable if the "indorsement states that it is made 'without

[6]For instance, the version of Black's Law Dictionary available at the time the Assignment Documents were signed only defines "with recourse" with reference to negotiable instruments: "Term which may be used in indorsing negotiable instrument and by which the indorser indicates that he remains liable for payment of the instrument." (Black's Law Dict. (6th ed. 1990) p. 1603.) Also, "recourse" is defined as "[t]he right of a holder of a negotiable instrument to recover against a party secondarily liable, *e.g.*, prior endorser or guarantor." (*Id*. at p. 1275.)

recourse' …." (Com. Code, § 3415, subd. (b).) Generally, where the indorser does not use such a qualified indorsement, the indorser is obligated to pay the amount due on the negotiable instrument if it is dishonored. (*Id.*, subd. (a).)

Another context where the terms with and without recourse frequently appear is the financing of automobile dealerships. (E.g., *Security Credit Corp. v. Jesse* (1980) 46 Or.App. 399 [611 P.2d 702].) Under an arrangement to finance the dealership's inventory, the lender receives an assignment from the dealership of the installment sales contracts entered by customers who purchase vehicles. The assignment can be either with or without recourse. In *Ranchers Bank v. Pressman* (1971) 19 Cal.App.3d 612, a bank agreed to finance a car dealer and the dealer agreed to assign installment sales contracts to the bank with recourse. The court described the relationship created as follows: "The basic agreement provided in effect that [the dealer] would endorse such contracts to the bank 'with recourse.' Such an endorsement pledges that the endorser, here [the dealer], guarantees the payment of the contract obligations." (*Id.* at p. 615.)

We will assume for purposes of this appeal that the foregoing statement, along with the dictionary definition of recourse in footnote 6, *ante*, sets forth the objectively reasonable meaning of the term "with recourse" and, thus, an assignment with recourse is the equivalent of a guarantee by the assignor. (See *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 [California uses objective standard when interpreting parties' words and other manifestations of intent; thus, undisclosed subjective understandings are irrelevant].) Consequently, we will assume that B&C agreed to be secondarily liable under contract MBX2009 in the event USA Mining, the primary obligor, did not perform the contract.

Based on these assumptions, we will address the trial court's findings that (1) B&C was not bound by the Assignment Documents because of the lack of consideration and (2) any guarantor-type relationship B&C had with DeSantis was extinguished by the December 1998 amendment to contract MBX2009 and the MOU.

IV. Lack of Consideration

The trial court specifically found "that the assignment transaction lacks consideration and is therefore unenforceable as to B&C and/or Bilello."

DeSantis claims this finding contains legal error. He does not argue that B&C or Bilello received consideration. Instead, DeSantis argues the assignment made in this case did not require separate consideration because contract MBX2009 involves a transaction in goods to which the California Commercial Code applies, and Commercial Code section 2210, subdivision (2) provides for assignments without consideration where there is no material change in the duty, burdens, or risks of the parties.

In the circumstances of this case, we cannot agree with DeSantis that the Assignment Documents did not materially change the duties and burdens imposed upon B&C. Simply put, the Assignment Documents did more than merely transfer some contractual rights from B&C to DeSantis. The Assignment Documents purported to impose new contractual obligations on B&C. In particular, B&C agreed to an assignment "with recourse" and thus agreed to secondary liability—that is, liability that would arise if USA Mining did not perform its obligations under contract MBX2009. The assignment with recourse materially changed the risks and burdens to which B&C was subject because, prior to executing the Assignment Documents, B&C did not have the risk of liability to another party in the event USA Mining did not deliver the gold. Therefore, the obligation of secondary liability undertaken by B&C in the Assignment Documents, unlike a mere assignment of contractual rights, requires separate consideration to be enforceable as a contractual obligation. (See Civ. Code, § 1550 [consideration is essential element of a contract].)

This conclusion also can be rendered in the language of Civil Code section 1458, which provides that a "right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." The right of DeSantis to recourse against B&C is not a "right arising out of [contract MBX2009]" but is a separate contractual right that the Assignment Documents attempted to create and, as such, is

subject to the general requirements of California contract law, including the need for consideration.

We note that the lack of consideration did not render the assignment of B&C's rights under contract MBX2009 unenforceable against USA Mining. The assignment itself was valid in the sense that USA Mining was bound to perform its obligations under the contract for the benefit of the assignee, DeSantis. The critical question, however, is whether DeSantis's right of recourse against B&C—a right created by the Assignment Documents—is enforceable without consideration. As discussed earlier, that right to recourse against B&C is not enforceable without consideration. (Cf. *Niederer v. Ferreira* (1983) 150 Cal.App.3d 219, 224 [party seeking to avoid enforcement of guaranty has burden of proving lack of consideration].)

Here, it is undisputed that B&C received no consideration in exchange for undertaking the obligations contained in the Assignment Documents. Therefore, the trial court correctly concluded that the obligations imposed upon B&C by the Assignment Documents were not enforceable by DeSantis because of the lack of consideration.

V. Extinguishment of Recourse Obligation

USA Mining could not meet its initial delivery obligations to DeSantis in December 1998. As a result, Geiger negotiated an extension and the parties signed a document entitled Amendment of Contract MBX2009 and Notice of Election of Delivery, which was dated as of December 30, 1998. The amendment provided:

> "1. For and in consideration of this extension, Sovereignty, LLC and R. Douglas Dahl agree to guarantee performance under said Contract for Delivery of Gold, together with this amendment and shall stand in stead of any other Guarantor or hedge, except USA Mining, Inc."

The amendment extended the delivery date for the first 1,000 ounces of gold to January 15, 1999.

In paragraph No. 7 of its statement of decision, the trial court rejected DeSantis's assertion that B&C or Bilello guaranteed the obligations of USA Mining by concluding they were not guarantors and, "even if they were guarantors, this obligation was

extinguished by the agreement of December 30, 1998, amendment of Contract MBX2009 substituting any other guarantor with Dahl/Sovereignty LLC."

DeSantis's appellate briefing does not address this ground for the trial court's conclusion that B&C and Bilello were not liable for breach of contract.

In the quote from *Ranchers Bank v. Pressman, supra,* 19 Cal.App.3d 612 set forth in part III.C, *ante*, the court characterized the car dealer who assigned contracts to the bank with recourse as a guarantor of the contracts. Similarly, B&C aptly could be described as a guarantor because it assigned its rights under contract MBX2009 with recourse. Therefore, we will examine the trial court's alternate determination that any obligation B&C and Bilello had as guarantors was extinguished.

We conclude that the language in the December 30, 1998, amendment stating that Sovereignty, LLC, and Dahl stood in place of any other guarantor was unambiguous. The trial court correctly interpreted and applied this language when it concluded that Dahl and Sovereignty, LLC, had guaranteed USA Mining's delivery obligation and had been substituted for B&C.

This conclusion and the absence of consideration provide two independent grounds for upholding the trial court's determination that B&C and Bilello did not breach any enforceable contractual obligation owed to DeSantis under the Assignment Documents.

VI. Fraud

DeSantis contends the trial court erred in finding no fraud despite voluminous and uncontroverted evidence to the contrary.

First, DeSantis argues the evidence establishes that Bilello never had any intent to perform contract MBX2009 because Bilello testified that he never intended to procure any gold. This argument lacks merit because it is based on an inaccurate interpretation of B&C's contractual responsibilities. As discussed in part II.C., *ante*, B&C was not obligated to purchase any gold under contract MBX2009, much less pay a second time for gold for which DeSantis already had paid. Therefore, this theory of fraud lacks merit.

Second, DeSantis contends that the Assignment Documents constituted intentional misrepresentations. This contention, like the previous one, is based on DeSantis's interpretations of the documents and the position that any other interpretation must have been an intentional misrepresentation. We reject this contention because the poorly drafted Assignment Documents are subject to different interpretations and the fact that Bilello interpreted them differently than DeSantis (whose interpretation was influenced by what Geiger told him) does not equate to an intentional misrepresentation by B&C or Bilello. Here, it was within the province of the trial court as trier of fact to determine whether Bilello intentionally misread the Assignment Documents. Without a direct admission, a trier of fact must necessarily base its finding regarding intent on inferences drawn from the surrounding circumstances. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298 [proof of fraudulent intent often consists of inferences from circumstances].) Here, we cannot conclude that the inferences drawn by the trial court in making its findings were unreasonable as a matter of law. In short, the trial court may have found Bilello's testimony regarding his understanding of B&C's responsibilities under the Assignment Documents to be credible, and that testimony would constitute substantial evidence. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 [testimony of single witness, even if party to case, may constitute substantial evidence].) Accordingly, the trial court's finding that B&C and Bilello did not act with the requisite intent to commit fraud is supported by sufficient evidence.

VII. Attorney Fees Award

A. Background

From 2004 through posttrial motions regarding attorney fees and costs, B&C and Bilello incurred attorney fees and support staff fees to their lawyers in California and New York. Their New York lawyers appeared in this litigation *pro hac vice* and charged them $319,121 in attorney fees and $10,142 in support staff fees. The California lawyers charged B&C and Bilello $225,459.50 in attorney fees and $20,601.50 in support staff fees.

B&C and Bilello filed a motion for attorney fees to recover the $575,324 they incurred to the law firms. The trial court determined that (1) B&C and Bilello were entitled to attorney fees and (2) the amount of attorney fees set forth in their supporting declaration were reasonable. As a result, the court awarded B&C and Bilello attorney fees in the sum of $575,324.

On appeal, DeSantis challenges the award of attorney fees by asserting it is erroneous on its face and it is inconsistent with the trial court's statement of decision.

B. Applicable Rules of Law

An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 677 (*Sessions*).)

> "[W]hen a party litigant prevails in an action on a contract by establishing that the contract is invalid, … section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611.)

Similarly, "'[w]here a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed.' [Citation.]" (*Sessions*, *supra*, 84 Cal.App.4th at p. 679.)

To apply the foregoing principle, we inquire whether, assuming DeSantis had prevailed on the action, he would have been entitled to recover attorney fees from B&C or Bilello. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 906.) If DeSantis would have been entitled to fees from B&C or Bilello, then the mutuality of remedy requirement in section 1717 compels the conclusion that DeSantis is liable to B&C or Bilello for attorney fees.

C. Language Used in Attorney Fees Provision

The relevant attorney fees provision in contract MBX2009 is labeled "Collection Cost" and states:

> "If the scheduled gold deliveries pursuant to this Contract are not made when due, … Seller agrees to pay all costs of enforcement or collection incurred by the holder hereof including, reasonable legal fees and costs … to enforce the provisions hereof, or of any, Performance Guarantee Bond, or other Contract evidencing, securing or pertaining to the indebtedness evidenced hereby."

1. Application of language to USA Mining

As background for how this attorney fees provision works, we first will discuss how it would apply to the simpler case of a dispute between USA Mining and DeSantis.

Under the attorney fees provision, USA Mining, as "seller," agreed to pay the attorney fees incurred by *any holder* attempting to enforce or collect under the contract. The reference to a "holder" shows that USA Mining intended its obligation to pay collection costs and fees to benefit not only B&C (the original holder) but also any assignee of B&C (potential subsequent holders). Accordingly, under the collection cost provision of contract MBX2009, USA Mining would have been liable for DeSantis's attorney fees had DeSantis prevailed in a lawsuit against USA Mining.

Furthermore, the mutuality of remedy requirement in section 1717 would have required DeSantis to pay *USA Mining* for its attorney fees if DeSantis lost an enforcement action against USA Mining. (See *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 608-610 [assignee liable for attorney fees of original party to contract when assignee lost suit to collect money allegedly owed to assignor by original party].)

2. Application of contractual language and mutuality to B&C

With the foregoing background, we consider whether B&C had any contractual or statutory rights to recover attorney fees from DeSantis.

With respect to the matter of contractual liability for attorney fees, the language used in contract MBX2009's attorney fees provision shows that only the seller (USA Mining) agreed to pay the holder's costs of collection. The attorney fees provision in contract MBX2009 did not state that a holder would be liable for B&C's attorney fees.

Therefore, DeSantis is not liable for B&C's attorney fees under the terms of contract MBX2009.

The question of DeSantis's statutory liability for attorney fees is more complicated. Before a reciprocal obligation is imposed on DeSantis pursuant to section 1717, the exact scope of the attorney fees obligation set forth in the contract must be identified. Specifically, we must inquire whether DeSantis would have been entitled to his attorney fees *from B&C* had DeSantis prevailed on his claim that B&C breached contract MBX2009. (*Sessions*, *supra*, 84 Cal.App.4th at p. 679.) If DeSantis would have been able to recover attorney fees from B&C, then section 1717 provides that B&C would be entitled to recover its attorney fees from DeSantis. (*Sessions*, at p. 679.)

B&C argues that by executing the Assignment Documents, DeSantis accepted the terms of the assignment and all terms and conditions set forth in contract MBX2009, including its attorney fees provision. This argument is correct insofar as it goes, but it begs the critical question whether DeSantis would have been able to recover his attorney fees from B&C under that attorney fees provision. There is no language in contract MBX2009's attorney fees provision that would allow DeSantis or any other holder to recover attorney fees from B&C—the only entity made liable by the attorney fees provision is the seller (USA Mining). Accordingly, DeSantis lacked a contractual right to recover attorney fees from B&C. Without such a right, there is nothing to be made reciprocal. Therefore, we conclude that B&C cannot have a reciprocal statutory right under section 1717 to recover attorney fees from DeSantis.

B&C also argues that if DeSantis had prevailed on the theory that he was a third party beneficiary of contract MBX2009, he would have been able to recover his attorney fees and, therefore, B&C should recover its attorney fees from him. In certain situations, California courts have allowed signatory defendants to recover attorney fees from a losing nonsignatory plaintiff who claimed to be a beneficiary of the contract. (E.g., *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 380 [nonsignatory sublessee lost suit to enforce covenant in lease between landlord and lessee

and to collect attorney fees; sublessee liable for landlord's attorney fees].) The fact that a plaintiff asserted the right to attorney fees as a third party beneficiary is not enough. "[A] nonsignatory seeking relief as a third party beneficiary may recover fees under a fee provision only if it appears that *the contracting parties intended* to extend such a right to one in his position. [Citation.]" (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897.) In this case, the right or benefit to attorney fees set forth in contract MBX2009 was intended to bind only USA Mining—there is nothing in the terms of the attorney fees provision that evidences an intent to allow third parties to benefit from an obligation imposed on B&C to pay attorney fees. Therefore, we conclude that DeSantis would not have been entitled to recover attorney fees from B&C under his third party beneficiary theory.

B&C also seems to argue that it is entitled to attorney fees because section 1717, subdivision (a) states "the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Under B&C's literal reading of this provision, (1) it was the prevailing party on the contract claim based on contract MBX2009 and (2) whether it was the "party specified" in the contract—that is, a "holder"—is irrelevant under the statutory language. Therefore, B&C concludes, it "shall be entitled to reasonable attorney's fees" under section 1717.

We reject this interpretation of the statutory language as too broad. It is well established that section 1717 creates only a reciprocal right to attorney fees to protect a litigant who would have been liable under the terms of the contract for attorney fees. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 [§ 1717 established mutuality of remedy to prevent oppressive use of one-sided attorney fees provisions].) We decline to be the first court to interpret section 1717 to provide a party with rights to collect attorney fees when that party had no contractual obligation to pay attorney fees. Simply put, before the mutuality of remedy requirement can be applied to create liability, the litigant to be held liable for the prevailing party's attorney fees must have had a contractual right to recover

attorney fees *from the party that prevailed*, not just any party. Here, the attorney fees provision in contract MBX2009 did not include a promise by B&C to pay the attorney fees of any holder in general or of DeSantis in particular. Without such a provision, the mutuality of remedy requirement of section 1717 cannot be applied to allow B&C to recover attorney fees from DeSantis.[7]

B&C also contends that DeSantis's theory that B&C was a guarantor of USA Mining's obligations under contract MBX2009 by virtue of assigning its rights with recourse, included the obligation to pay a holder's attorney fees. (See *Grace v. Croninger* (1922) 56 Cal.App. 659, 667-668 [appellant was guarantor of real estate lease containing attorney fee provision; court stated guarantor's liability was commensurate with liability of lessees and upheld award of attorney fees to lessor].) B&C argues that California law allows a guarantor to recover its attorney fees where it would have been liable for the other party's attorney fees under the guaranty.

We recognize that B&C's recourse obligation could be interpreted broadly to mean that B&C would reimburse DeSantis for all of his contractual entitlements *that USA Mining did not pay*, which would include the attorney fees DeSantis incurred in pursuing the claim against USA Mining. Even if B&C agreed to pay the attorney fees incurred by DeSantis in pursuing USA Mining, it does not necessarily follow that B&C also agreed to pay the attorney fees DeSantis spent enforcing B&C's recourse obligation. In other words, agreeing to guarantee an obligation of another party is not the same as agreeing to pay the beneficiary's attorney fees spent enforcing the guaranty. That is why guaranties often contain their own attorney fees provisions. (E.g., *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1140 [guarantee of lease included a provision awarding attorney fees to prevailing party in action concerning the guaranty].)

[7]We note that B&C and Bilello have not argued that they somehow are entitled to step into USA Mining's shoes and benefit from the rights section 1717 provided to USA Mining.

In summary, we conclude that DeSantis would not have prevailed on his claim to recover attorney fees from B&C and, therefore, B&C is not entitled to a recovery of attorney fees under the mutuality of remedy requirement in section 1717.

D. Judicial Estoppel

B&C argues that DeSantis should be judicially estopped from contending that he would not have recovered attorney fees because DeSantis requested and received an award of over $50,000 in attorney fees in a default judgment against B&C and Bilello entered in the early stages of this lawsuit.

The doctrine of judicial estoppel applies when:

> "'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 351.)

The doctrine should be invoked, however, only in egregious cases where a party misrepresents or conceals material facts. (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 246.)

We join other courts in rejecting "the estoppel theory as a basis for imposing an attorney fee award." (*Sessions, supra,* 84 Cal.App.4th at p. 682; see *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC, supra*, 162 Cal.App.4th at p. 899 [Ct.App., 6th Dist. stated that cases embracing estoppel theory have not fared well].)

Furthermore, we will not apply a different rule of law merely because a default judgment that included attorney fees was entered in this case. First, the judgment obtained by default was vacated and never became a final, judicially adopted position on attorney fees that possibly could lead to inconsistent results. Second, a plaintiff who relies on a defendant's admission by default does not present the integrity problem of playing fast and loose with the judicial system. (See 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 176, p. 618 [defendant's failure to answer and

resulting judgment by default has same effect as express admission of matters well pleaded in the complaint].) Third, DeSantis's initial position that the attorney fees provision applied was not based on a misrepresentation or concealment of facts. Instead, it was based on an incorrect application of law.

Based on the foregoing, we conclude that DeSantis is not judicially estopped from asserting that B&C and Bilello should not be awarded attorney fees.

VIII. Adequacy of the Statement of Decision

DeSantis contends that the statement of decision contains error because (1) its findings are contradictory, inconsistent, and uncertain and (2) it fails to include findings on all of the material issues.

Because the award of attorney fees will be reversed, we need not consider DeSantis's claim that the award of attorney fees was inconsistent with the determinations set forth in the statement of decision.

With respect to the adequacy and internal consistency of the statement of decision, we conclude that it explains the trial court's determinations in a complete and direct manner.

The trial court's statement that contract MBX2009 amounted to an option is not legal error and accurately describes a critical aspect of the contract—namely, that B&C was not obligated to purchase any of the gold relating to the unassigned portion of the contract. Because the 4,000 ounces of gold had been paid for by DeSantis, one could say that DeSantis had exercised the option with respect to the 4,000 ounces and, as a result, USA Mining had an obligation to deliver the gold.

The trial court's conclusion that B&C and Bilello were not bound by any obligations set forth in the Assignment Documents is explained adequately by its findings regarding (1) the lack of consideration and (2) the extinguishment of any guaranty obligation by the December 31, 1998, amendment.

The claim that the trial court's determinations regarding fraud are so uncertain as to undermine the legal basis for the decision is not true. The trial court set forth findings

regarding the absence of more than one of the essential elements of a fraud cause of action. These findings of ultimate fact are sufficient and are not confusing when placed in the context of the interpretation the trial court gave the various documents. DeSantis's claim of uncertainty is based on his own interpretation of contract MBX2009, an interpretation that neither this court nor the trial court accepted. For example, the claim that the court did not explicitly find that Bilello lacked the intent to perform contract MBX2009 at the time of the assignment is based on the erroneous interpretation that B&C was obliged to pay for the 4,000 ounces a second time or obligated to purchase gold under the unassigned portion of the contract.

In summary, the statement of decision fairly discloses the court's determination as to the ultimate facts and material issues in the case. (*In re Marriage of Burkle*, *supra*, 139 Cal.App.4th at pp. 736-737, fn. 15.)

DISPOSITION

The portion of the second amended judgment that awards B&C and Bilello their attorney fees is reversed. In all other respects, that judgment is affirmed. The matter is remanded to the trial court for entry of a revised judgment in conformance with this decision. The parties shall each bear their own costs on appeal.

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DAWSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
KANE, J.